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No. 09-343

In The
Supreme Court of the United States

EDISON ELECTRIC INSTITUTE, ET AL.,
Petitioners,

v.

PIEDMONT ENVIRONMENTAL COUNCIL, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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LIST OF PARTIES

Petitioners:

Edison Electric Institute; American Public Power Association; National Rural Electric Cooperative Association; American Wind Energy Association; Allegheny Power; Trans-Allegheny Interstate Line Co.; and San Diego Gas & Electric Co.

Respondents:

Piedmont Environmental Council; Public Service Commission of the State of New York; and Minnesota Public Utilities Commission;

Federal Energy Regulatory Commission;

Communities Against Regional Interconnect

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. Rule 29.6, Respondents state as follows:

As State entities, the People of the State of New York, the Public Service Commission of the State of New York, and the Minnesota Public Utilities Commission, are not required to file a disclosure statement under Rule 29.6.

Piedmont Environmental Council is not a publicly held corporation or entity and has no parent corporations. Piedmont Environmental Council is not a trade association.

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COUNTER-STATEMENT OF THE CASE

Authority to approve or deny a permit for the construction of electric transmission facilities has traditionally been exclusively reserved to the States, in large part because the construction of such facilities directly implicates compelling State interests concerning, among other things, land-use, environmental impacts, energy planning, and use of State resources. In 1935, Congress enacted the Federal Power Act (FPA) as part of a legislative scheme under which the Federal government regulated electric transmission and sales of electric energy for resale in interstate commerce, while States retained control over local matters, including siting of transmission lines and generating plants. *New York v. FERC*, 535 U.S. 1, 24 (2002).

In 2005, for the first time, Congress granted the Federal Energy Regulatory Commission (FERC) carefully limited "backstop" jurisdiction over the siting of electric transmission facilities when it enacted a new Section 216 of the FPA.[1] Section 216 allows FERC to grant siting permits in five very specific circumstances. *See, generally,* 16 U.S.C. §824*p*(b). One such circumstance – which is the focus of this case – is when a State having legal authority to site a proposed line and consider its interstate benefits, has "withheld approval for more than 1 year after the filing of an application" for a siting permit. *Id.* at §824*p*(b)(1)(C)(i).

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[1] Energy Policy Act of 2005 (EPAct 2005), Title XII, Pub. L. No. 109-58, 119 Stat. 594 (2005) (adding new §216 to the FPA, codified at 16 U.S.C. §824*p*).

In the broader context of EPAct 2005, transmission line siting is only one element among many in Congress' multifaceted energy policy reform.[2] As the Senate stated, "[t]he purpose of the measure is to provide a comprehensive national energy policy that balances domestic energy production with conservation and efficiency efforts to enhance the security of the United States and decrease dependence on foreign sources of fuel." S. Rep. No. 109-78, at 1 (2005). The scope of EPAct 2005 is broad and covers numerous topics including, *e.g.*, energy efficiency, renewable energy resources, natural gas storage, clean coal technology, and alternative fuels for vehicles, to name a few. *See* EPAct 2005 §1, "Table of Contents."

To the extent Congress addressed transmission siting, it granted FERC its limited "backstop" siting authority when, generally speaking, a State either cannot act, or has failed to act in a timely manner. In deference to States' traditional authority over transmission siting, Congress confined FERC's new siting jurisdiction to five specific triggering events: 1) when a State lacks authority to approve the siting of transmission facilities; 2) when a State lacks authority to consider the expected interstate benefits of a facility; 3) when an applicant does not qualify for a State permit because it does not serve end users within the State; 4) when a State, having received a permit application, has "withheld approval for more than 1 year;" or 5) when a State conditions its approval such that the project will not significantly reduce

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[2] This is contrary to the impression Petitioners seek to create that streamlined siting and permitting was the sole purpose of the statute. Pet. Br. at 5.

transmission congestion or is not economically feasible. 16 U.S.C. §824*p*(b)(1)(A)-(C).

FERC's backstop siting authority is further confined to geographic areas that the United States Department of Energy (DOE) has designated as a "national interest electric transmission corridor." *Id.* at §824*p*(a)(2), (b). A national interest electric transmission corridor is only an area, designated by the DOE, where transmission congestion adversely affects consumers. According to DOE, moreover, the designation of such a corridor does not indicate that additional transmission facilities are needed.[3]

The particular statutory language at issue in this case, the phrase "withheld approval for more than 1 year," reflects a change that was made to the language of an earlier legislative proposal in order to address concerns that the earlier proposal might have allowed FERC to override every State transmission siting decision. The earlier draft of the bill would have authorized FERC review where a State "has withheld approval, ... or delayed final approval for more than one year". H.R. 6 §16012(b)(1)(B) (as introduced), 149 Cong. Rec. H3130 (Apr. 10, 2003). Commenting on this initial draft, Representative Henry E. Brown, Jr. observed that "the transmission siting provision ... seems to make FERC look more like a Court of

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[3] In DOE's words, "a National Corridor designation does not constitute a finding that transmission must or even should be built; it does not prejudice State or Federal siting processes against non-transmission solutions; and it should not discourage market participants from pursuing such solutions." USDOE, *National Electric Transmission Congestion Report*, 72 Fed. Reg. 56,992, 57,012 (Oct. 5, 2007) (emphasis added).

Appeals for energy companies dissatisfied with State decisions, than a true backstop[,]" and that "the potential for FERC review for every siting decision seems a step backward." *Comprehensive Nat'l Energy Policy: Hearings Before the Subcomm. on Energy and Air Quality of the Comm. on Energy and Commerce*, 108th Cong. 13 (2003). Likewise, Representative Rick Boucher expressed concern that the initial draft bill "would give the FERC preemptive authority over the siting of transmission lines[,]" stating that he had "heard no evidence that would justify removing the ultimate decision over this new siting from the States to the Federal level." *Id.* at 297.

Importantly, the language of Section 216, as finally enacted, eliminated the two separate jurisdictional triggers – "withheld approval" or "delayed final approval for more than one year" – and replaced them with the single trigger of "withheld approval for more than 1 year." H.R. Rep. No. 108-375 at 264 (2003). FERC's then-Chairman Pat Wood, III, explained that FERC's understanding was that this single trigger would confer limited authority upon the agency:

> So the States are still in the driver's seat. It is only when they cannot act, or they are prohibited by their law from acting, or they choose not to act, that it comes to the Federal Government .... .

Keeping the Lights On: The Federal Role in Managing the Nation's Elec.: Hearing Before the Oversight of Gov't Mgmt., the Federal Workforce and the Dist. of Columbia Subcomm. of the S. Comm. on Governmental Affairs, S. Hrg. 108-277, 108th Cong. 50 (2003). Although the Senate later failed to agree to the

Conference Report, the single trigger was enacted into Section 1221 of EPAct 2005, and became part of new Section 216 of the FPA.

In its Notice of Proposed Rulemaking to enact rules implementing Section 216, FERC did not indicate that it would interpret the phrase "withheld approval for more than 1 year" to include a State's denial of a siting application within one year. *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Corridors*, 71 Fed. Reg. 36,258 (proposed June 16, 2006). Nor was this interpretation suggested by any of the 51 comments FERC received in response to its Notice of Proposed Rulemaking.

Nonetheless, a majority of FERC commissioners adopted this interpretation in the preamble to FERC's final regulation. *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, 71 Fed. Reg. 69,440, 69,444 ¶26 (Nov. 16, 2006) (Order No. 689); Pet. App. at 70a. FERC's interpretation, however, was not promulgated as part of its regulation, which generally adopted the language of Section 216, and merely repeated the phrase "withheld approval for more than one year." 18 C.F.R. §50.6(e)(3)(i).[4] The majority reaffirmed their

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[4] Prior to issuing Order 689, FERC did not contend it had authority to preempt state siting decisions. A statement issued by then-FERC Chair Joseph Kelliher instead said the new law gave FERC "a carefully limited role that supplements state authorities rather than supplanting them." Statement of FERC Chair Joseph T. Kelliher, *Electric Grid and Summer Heat, House Government Reform Committee-Subcommittee on Energy and Resources Hearing* at 8, *available at* http://www.ferc.gov/eventcalendar/files/20060712145318-Kelliher-test-07-12-06.pdf

interpretation on rehearing. *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, 119 F.E.R.C. ¶61,154, at ¶¶11, 15, 17, 19 (May 17, 2007) (rehearing order). Pet. App. at 252a, 254a-55a, 256a-57a, 258a.

Notably, FERC's view of the statute was not unanimous. Commissioner Suedeen G. Kelly strongly dissented. Order No. 689, 71 Fed. Reg. at 69,476; Pet. App. at 240a. Commissioner Kelly stated it was "nonsensical" to read the statute as the majority did, because it would render the phrase "for more than one year" superfluous. Order No. 689, 71 Fed. Reg. at 69,476; Pet. App. at 242a. Commissioner Kelly also observed that it "defies common sense to insert the concept of 'reject' or 'deny' into [the statutory phrase] 'withheld approval for more than 1 year after the filing of an application.'" Order No. 689, 71 Fed. Reg. at 69,476; Pet. App. at 241a.

Piedmont Environmental Council (Piedmont), the Public Service Commission of the State of New York (NYPSC), the Minnesota Public Utilities Commission (Minn. PUC) and Communities Against Regional Interconnect (CARI) timely petitioned for review of FERC's orders, pursuant to 16 U.S.C. §825*l*(b). Because the first of these four petitions was filed in the

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(July 12, 2006). Then-Chairman Kelliher also said that Section 216 "do[es] not preempt the states" but instead provides "a federal siting process [that] supplements a state siting process" Statement of Joseph T. Kelliher, Chairman of FERC, Regulations for Filing Applications for Permits to Site Transmission Facilities, FERC Docket No. RM06-12-000 (June 15, 2006), *available at http://www.ferc.gov/news/statements-speeches/kelliher/2006/06-15-06-kelliher-C-1.asp*.

Fourth Circuit, the other three petitions were transferred to that court, pursuant to 28 U.S.C. §2112(a)(1),(5), and the cases were consolidated there. Pet. App. at 15a.

Deciding the case at Step One of the framework adopted by this Court in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), a majority of the Fourth Circuit panel held that the word "withheld," in the particular context of the phrase "withheld approval for more than 1 year," and in the larger context of the statute, plainly is not synonymous with "denied." *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 313 (4th Cir. 2009). Pet. App. at 17a-18a. First, with respect to the particular context, it observed that the phrase "withheld approval" within the larger phrase "withheld approval for more than 1 year" expressly pertains to a State's continually recurring failure to act on an application throughout an ongoing period of one year, but does not pertain to the instantaneous act of denial. *Id.*. Thus, the Fourth Circuit found that FERC's attempt to conflate "denied" and "withheld" would render the entire phrase "withheld approval for more than 1 year" nonsensical. 558 F.3d at 313; Pet. App. at 18a. ("FERC's word substitution ... renders the entire phrase nonsensical ...."). *Id.*

The panel further concluded the broader context, namely Section 216(b)(1) as a whole, confirmed that the phrase "withheld approval for more than 1 year" does not encompass a denial of a permit within one year. *Piedmont*, 558 F.3d at 314; Pet App. at 19a-21a. The Fourth Circuit reasoned that Section 216(b)(1), 16 U.S.C. §824*p*(b)(1), "provides a carefully drawn list of five circumstances" under which FERC "may preempt

a state ...." 558 F.3d at 313; Pet. App. at 19a. It decided that, "[w]hen the five circumstances in §216(b)(1) are considered together, they indicate that Congress intended only a measured, although important, transfer of jurisdiction to FERC." *Piedmont*, 558 F.3d at 314; Pet App. at 20a. The Fourth Circuit observed that reading "withheld approval" to include denial of a permit would "render[] it completely out of proportion with the four other jurisdiction-granting circumstances[,]" and "would mean that Congress has told state commissions that they will lose jurisdiction unless they approve every permit application in a national interest corridor." *Id.* This, it found, was contrary to the limited authority Congress gave FERC, because it would make it "futile for a state commission to deny a permit based on traditional considerations like cost and benefit, land use and environmental impacts, and health and safety." *Id.* The Fourth Circuit reasoned that "if Congress intended to take the monumental step of preempting state jurisdiction *every time* a state commission denies a permit in a national interest corridor, it would surely have said so directly." *Piedmont*, 558 F.3d at 314; Pet. App. at 21a (emphasis in original). Consequently, it reversed FERC's interpretation. The Fourth Circuit concluded that Congress did not intend to authorize FERC to act where a State has committed the final administrative act of denying an application for a siting permit within one year. *Piedmont*, 558 F.3d at 314; Pet. App. at 22a-23a.

Judge Traxler dissented, opining that the phrase "withheld approval" also applies to State denials. *Piedmont*, 558 F.3d at 322-23; Pet. App. at 41a-42a. Judge Traxler relied heavily on FPA §216(b)(1)(C)(ii)

which authorizes FERC review when a State has "conditioned its approval in such a manner that the proposed construction or modification will not significantly reduce transmission congestion in interstate commerce or is not economically feasible." 16 U.S.C. §824*p*(b)(1)(C)(ii). Judge Traxler concluded it was nonsensical for Congress to have allowed FERC to review permit conditions, but not permit denials. *Piedmont*, 558 F.3d at 323-24; Pet. App. at 43a-44a. He found further support in, *inter alia*, the legislative history. *Piedmont*, 558 F.3d at 324; Pet. App. at 46a-48a.

The Fourth Circuit denied rehearing after the panel failed to request that the judges be polled. *Piedmont Envtl. Council v. FERC*, No. 07-1651 (4th Cir. Apr.20, 2009); Pet. App. at 51a.

FERC has not petitioned this Court for a writ of certiorari to the Fourth Circuit. Rather, only the various electric power industry intervenors, who intervened in the Fourth Circuit proceeding in support of FERC, now seek certiorari.

REASONS FOR DENYING A WRIT OF CERTIORARI

This is an unremarkable case applying Step One of the familiar *Chevron* standard of review to FERC's construction of the statutory phrase "withheld approval for more than 1 year" in light of its context and the purpose of EPAct 2005 §1221. Because the Fourth Circuit simply applied traditional principles of statutory construction to comprehend the relevant provision's plain meaning, this case does not present an important question of Federal law. There is no

compelling reason, therefore, to grant a writ of certiorari.

The Fourth Circuit correctly construed the statute. That Court properly concluded that, in its specific context, the word "withheld" cannot be equated to "denied." It correctly understood that a "withholding" of approval is continuous, while a "denial" is instantaneous, and stops the running of time during which approval was being withheld. Likewise, the Fourth Circuit recognized that FERC's equating of "withheld" and "denied" reads the words "for more than 1 year" out of the statute. And, in the broader context of §1221, the Fourth Circuit properly concluded that Congress intended to provide FERC with measured, limited backstop siting authority, in recognition of Congress' careful balancing of national transmission reliability interests against States' traditional authority in the area of land use regulation.

In the Fourth Circuit's opinion, the dissent incorrectly imputed into the statute a purpose of authorizing FERC to site transmission lines whenever the State process does not generate either an outright permit grant or a minimally conditioned one. Consistent with this misapprehension, the dissent failed to recognize that State approval can only be "withheld" while an application is pending. Likewise, the dissent failed to appreciate why Congress intended to authorize FERC siting in the event of a State grant with conditions that may frustrate Federal interests in relieving transmission congestion, but not necessarily whenever a State has lawfully denied a permit. State denials are subject to review in State courts and, by preserving the primary State role, Congress recognized that State courts are capable of reviewing the

lawfulness and reasonableness of a State permit denial. Conversely, when a State agency imposes conditions interfering with the ability of a proposed line to relieve interstate congestion or rendering a proposed line uneconomic, Congress authorized a limited Federal intrusion upon State jurisdiction. Such circumstances raise questions relating more directly to federal interests, and potentially triggering FERC's technical expertise. *See* POINT I. A, *infra*.

Petitioners' argument that a judicial dissent creates "ambiguity" invoking *Chevron* Step Two analysis rests upon a fundamental misunderstanding of *Chevron*. Statutory "ambiguity" under *Chevron* occurs only when Congress has implicitly delegated to an agency authority to resolve the policy question at issue by leaving a statutory gap for the agency to fill. Because judicial disagreement cannot substitute for Congress' intentions, it does not trigger *Chevron* Step Two analysis. *See* POINT I. B, *infra*.

Nothing in the legislative history cited by Petitioners expressly resolves the pertinent question of whether Congress intended to override legitimate State permit denials. *See* POINT II. A, *infra*. Moreover, Petitioners overlook the DOE's findings that transmission economics and market structure present significant transmission development obstacles that may overshadow the siting process. *See* POINT II. B, *infra*. In any event, Congressional policy on electric transmission remains in flux. There is no urgency, therefore, demanding this Court's immediate attention. *See* POINT II. C, *infra*.

Finally, Petitioners incorrectly speculate that siting applications may halt if FERC cannot review State

siting denials. Petitioners offer no basis for assuming State agencies will act inappropriately in considering the interstate benefits of proposed lines or that State courts will not carefully review timely denials to ensure that interstate benefits were properly considered. *See* POINT III, *infra*.

I. THE FOURTH CIRCUIT MAJORITY PROPERLY CONSTRUED THE STATUTE BY EMPLOYING FUNDAMENTAL STATUTORY CONSTRUCTION PRINCIPLES IN A STRAIGHTFORWARD MANNER.

A. This is an unremarkable *Chevron* statutory construction case, which the Fourth Circuit decided correctly.

At issue in this case is whether FERC properly construed the phrase "withheld approval for more than 1 year ...." The Fourth Circuit majority applied Step One of the familiar *Chevron* standard and held that the plain statutory language precluded FERC's interpretation. There is nothing remarkable about the majority's straightforward application of *Chevron*. This case does not involve an "important question of federal law that has not been, but should be, settled by this Court,"[5] Sup. Ct. R. 10(c), and, therefore, it does not present any compelling reason to grant a writ of certiorari.

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[5] Because this case does not involve a conflict between federal and/or state courts, Sup. Ct. R. 10(a), (b), a departure from the accepted and usual course of judicial proceedings, *id.* R. 10(a), or an important federal question decided in a way that conflicts with relevant decisions of this Court, *id.* R. 10(c), this reason is the only potential certiorari ground available to Petitioners.

The Fourth Circuit supported its interpretation of the plain language of the statute, through the straightforward application of principles of statutory construction, in an analysis that fits squarely within Step One of *Chevron*. As this Court has held on numerous occasions, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

1. *The Fourth Circuit majority correctly construed the word "withheld" in its specific context.*

The Fourth Circuit correctly found that the word "withheld" as used in its specific context is not synonymous with "denied." It properly recognized that the phrase "withheld approval for more than 1 year" describes when approval has been continuously held back throughout an ongoing period of one year. *Piedmont*, 558 F.3d at 313; Pet. App. at 17a-18a. The word "withheld" in this context is limited to a continually recurring failure to act throughout a period of one year. The majority also understood the converse – that a denial of an application is a discrete and final action. Thus, a denial "stops the running of time during which approval was withheld." *Id.* The word "withheld," therefore, cannot be equated to the word "denied" in the specific statutory context.

Similarly, the court below recognized that FERC's attempt to substitute "denied" for "withheld" would render the larger phrase "withheld approval for more than 1 year" nonsensical. It explained that "the final

nature of 'denied' conflicts with the continuing nature of '*for* more than one year.'" *Id.* (emphasis in original). A permit denial rendered less than one year after the filing of an application terminates the State agency's application process, and nothing in that process would continue for the remainder of the one-year period. Petitioners accuse the Fourth Circuit of inappropriately substituting "action" for "approval" and therefore not reading the actual words of the statute. Pet. Br. at 16. In so doing, they isolate one sentence in the relevant paragraph, but fail to recognize that the Fourth Circuit considered the entire phrase "withheld approval for more than 1 year." In actuality, the Fourth Circuit concluded that "[t]he continuous act of withholding approval for more than a year cannot include the finite act of denying an application within the one-year deadline." *Piedmont*, 558 F.3d at 313; Pet. App. at 17a. The Court properly attributed to Congress the most natural, common-sense reading of the statute. *United States v. Powell*, 423 U.S. 87, 93 (1975).

2. *The Fourth Circuit majority correctly construed the phrase in its broader statutory context.*

Contrary to claims in the Petition, Pet. Br. at 16-17, the Fourth Circuit correctly construed the statute in its broader context. *Robinson*, 519 U.S. at 341. It properly recognized that Congress intended a measured transfer of jurisdiction in order to ensure that a commission (either a State commission or FERC) is available to make timely decisions on transmission siting applications within National Interest Electric Transmission Corridors. *Piedmont*, 558 F.3d at 314; Pet. App. at 20a. In this manner,

Congress balanced national interests against States' traditional authority in the area of land use regulation, energy planning and the adequacy of utility service. The Fourth Circuit explained that §216(b)(1), as a whole, "provides a carefully drawn list of five circumstances" where FERC jurisdiction over a permit application attaches. *Piedmont*, 558 F.3d at 314; Pet. App. at 19a Those circumstances are when: 1) the State lacks siting authority; 2) the State lacks authority to consider the expected interstate benefits of a proposed line; 3) the applicant does not qualify for a State permit because it does not serve end-user customers; 4) a State commission has "withheld approval for more than 1 year" after the filing of an application, or the designation of a National Interest Electric Transmission Corridor, whichever is later; or 5) a State has imposed conditions that render the line uneconomic or ineffective to reduce significantly transmission congestion. *Piedmont*, 558 F.3d at 314; Pet. App. at 19a.

The four other circumstances — aside from "with[holding] approval for more than 1 year" — pertain to when a State either cannot site the line, or has imposed onerous conditions. *Piedmont*, 558 F.3d at 314; Pet. App. at 20a. Petitioners object to the Court's observation that FERC's interpretation would render it "futile" for the States to do their normal work of reviewing a line. Pet. Br. at 18. Instead, they argue that, even if FERC may issue a permit in any case where a State has not approved a permit within one year, States would retain the ability to decide significant routing and other issues, albeit subject to FERC review. Pet. Br. at 18. But the Fourth Circuit was correct. FERC's interpretation would leave States having siting authority with no choice but to approve

a line, or cede jurisdiction to FERC. FERC's interpretation would thus nullify the important and primary State role that Congress carefully preserved.

Given that the remainder of §216(b)(1) carefully delineates a limited transfer of authority from the States to FERC, the Fourth Circuit correctly recognized that, read as a whole, the statute does not indicate Congress intended "the sweeping transfer of jurisdiction" FERC sought. The Fourth Circuit also noted that, "if Congress had intended to take the monumental step of preempting state jurisdiction *every time* a state commission denies a permit in a national interest corridor, it would surely have said so directly." *Piedmont*, 558 F.3d at 314; Pet. App. at 21a (emphasis in original). The Fourth Circuit's observation is in accord with this Court's decisions regarding the interpretation of statutes involving Congressional balancing of Federal and State power. *See Wyeth v. Levine*, ____ U.S. ____, ____, 129 S. Ct. 1187, 1195 (2009) (noting that, "[i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . [the Court] start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (internal quotes omitted)).

3. *The Fourth Circuit dissent misread the statute.*

The reasoning of the FERC majority and the Fourth Circuit dissent (and of Petitioners as well, Pet. Br. at 17) imputes to Congress a broad statutory purpose unsupported by the language Congress

actually employed. The express language of a statute is the most reliable evidence of Congressional intent. *United States v. Turkette*, 452 U.S. 576, 593 (1981). This is because "[f]ederal legislation is often the result of compromise between legislators and 'groups with marked but divergent interests.'" *Wyeth v. Levine*, ____ U.S. ____, ____, 129 S.Ct. 1187, 1215 (2009) (Thomas, J., concurring) (*quoting Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 93-94 (2002)). This Court has noted that even under a more liberal statutory construction standard, it is inappropriate "to assume that *whatever* furthers the statute's primary objective must be the law" without textual support. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) (*quoting Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis in original)).

Here, the Fourth Circuit dissent's asserted Congressional objective – to grant FERC jurisdiction over transmission siting whenever a State process does not generate an outright grant or minimally conditioned grant – rests upon an uncertain foundation. For example, Judge Traxler, in describing the context within which Congress enacted Section 216, relied primarily on a pre-enactment statement made by Senator Pete V. Domenici. *Piedmont*, 558 F.3d at 321; Pet. App. at 37a. But the statement of Senator Pete V. Domenici spoke only in general terms about avoiding blackouts, providing limited federal siting authority, and streamlining the siting process to assure adequate transmission. *Id.* It did not address the particular roles of the States and FERC in the siting process, and did not address the language that Congress actually employed.

Although Judge Traxler purported to rely upon the plain meaning of the statutory language, his discussion of the overall "context" within which Congress approved Section 216 indicates that his interpretation was driven not by the particular language and structure of the statute. Instead Judge Traxler's reasoning relies primarily upon a general statutory purpose that he imputed to Congress. In Judge Traxler's words, "[t]he notion that Congress would have been willing to 'trump' states when they thwart the goal of significantly reducing transmission congestion in a national interest [transmission] corridor by granting permits subject to conditions FERC determines to be unreasonable but would not be willing to do so when states thwart the same goal by denying the permits outright makes no sense to me in light of the purpose of the legislation." *Id.* Thus, Judge Traxler's reading of "withheld approval for more than 1 year" was influenced primarily by his view that Congress had a singular purpose of reducing transmission congestion – a purpose he derived in large part from the statement of Senator Pete V. Domenici. *Piedmont*, 558 F.3d at 321; Pet App. at 37a. But if Congress intended such a wholesale transfer of siting jurisdiction to FERC, it could, and would, have expressly said so. Indeed, Congress did so in the Natural Gas Act, with respect to interstate gas transportation facilities. 15 U.S.C. §717f. By first imputing a statutory purpose, and then interpreting the statute in light of that purpose, Judge Traxler misapplied Step One of the *Chevron* analysis. Under *Chevron* Step One, a court must first look to the actual language of the statute, and seek to ascertain its plain meaning based on both its specific and general statutory context.

Moreover, Judge Traxler's dissent (and Petitioners [Pet. Br. at 17]) failed to apprehend key differences between outright State permit denials and State permit grants with conditions that would cause the project to "not significantly reduce transmission congestion in interstate commerce or [not be] economically feasible." 16 U.S.C. §824*p*(b)(1)(C)(ii); *Piedmont*, 558 F.3d at 324; Pet. App. at 43a-44a. Permit denials are generally subject to challenge in State courts. Thus, Petitioners' fear that a State decision that is "indefensible based on the evidence presented" would be unreviewable, is unfounded. Pet. Br. at 15. Congress properly concluded that a State court can review and reverse such a decision.

Further, Petitioners err when they argue that it is illogical to read the statute as allowing FERC to review permits "encumbered with unreasonable conditions" but not permits "denied outright." Pet. Br. at 17. In the former case, FERC 'backstop" siting authority makes sense, because questions of whether State permit conditions render a project unable to significantly reduce interstate transmission congestion, or cause it to be economically infeasible, are best resolved with the aid of FERC's technical expertise. Congress further recognized that a State that has granted a permit has less of an interest in protecting the ability of State courts to review a decision.[6] A State that has conditionally approved a

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[6] Petitioners contend that it "could be entirely appropriate for a state to condition a project on terms that are economically onerous, depending on the circumstances of the particular proposal" Pet. Br. at 17. It is hard to imagine such a situation, however, because a state certifying a line under such circumstances is either a) mistaken about the wisdom of the

line, based on a finding that such line is needed, has no compelling interest against FERC review of the conditions the State has imposed. On the other hand, as the Fourth Circuit correctly observed, a State that imposes "project-sinking conditions . . . misuses its authority." *Piedmont*, 558 F.3d at 315; Pet. App. at 21a. Congress properly decided that FERC should be able to review and address any such misuse. Its decision to employ such a finely-tuned trigger for federal intrusion contradicts FERC's claim that it has jurisdiction whenever a State fails to approve a project within one year.

Petitioners also fail to justify the dissent's reasoning that the continuing effect of a State's denial beyond the statutory one-year period constitutes a "with[holding] approval for more than 1 year." Pet. Br. at 15. This is nonsensical because a State's review process concludes when a permit application is denied. A "withholding" on the part of a State only occurs while a decision is pending. Because a permit application ceases to be active after a permit denial, there can be no continuous "withholding" of approval after such a denial. Contrary to Petitioners' attempted analogy, Pet. Br. at 15, one cannot rightly say this Court has, for over 50 years, continuously withheld affirmance from parties who sought to preserve "separate-but-equal schools." As Petitioners recognize, "the actual holding was a discrete decision in 1954." An accurate characterization would therefore be that the Court long ago held that separate but equal schools are unconstitutional. Similarly, a State commission

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conditions, or b) should be denying approval because the line can only be certified on conditions making it uneconomic.

denying a permit application does so on a particular day, and does not continuously "withhold approval" thereafter.

The tightly restricted State role advocated by Petitioners, Pet. Br. at 18, including a mere "advisory" role through State participation in the FERC siting process, ignores Congressional concerns that FERC not act as a "Court of Appeals for energy companies dissatisfied with State decisions." *Comprehensive Nat'l Energy Policy: Hearings Before the Subcomm. on Energy and Air Quality of the Comm. on Energy and Commerce*, 108th Cong. 13 (2003).

B. An appellate court dissent does not create statutory "ambiguity" entitling an agency to judicial deference.

Petitioners' claim that the Fourth Circuit erred by not granting FERC's interpretation deference under Step Two of *Chevron* should be rejected. Pet. Br. at 19-20. In this case, no statutory "ambiguity" exists for *Chevron* purposes. Both the Fourth Circuit majority and dissent applied the *de novo* standard of *Chevron* Step One because they found that the issue should be decided based upon the plain meaning of the statutory language. *Piedmont*, 558 F.3d at 315, 321; Pet. App. at 23a, 38a. Thus, none of the Judges in the Fourth Circuit found the statute ambiguous in the relevant sense under *Chevron*.

Petitioners, however, advance the novel theory that §216(b)(1)(C) became ambiguous because the Fourth Circuit panel did not entirely agree on the plain meaning of the statute. *Id.* Petitioners, in effect, argue that literal "ambiguity" is equivalent to *Chevron*

"ambiguity." Petitioners rely upon this alleged "ambiguity" as a basis for arguing the Fourth Circuit erred by not proceeding to *Chevron* Step Two. Pet. Br. at 20.

This argument fundamentally misconstrues the meaning of the term "ambiguous" in the context of the *Chevron* analysis. "*Chevron* deference ... is not accorded merely because the statute is ambiguous and an administrative official is involved." *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). Rather, deference to an agency's statutory interpretation is granted when the question requires "reconciling conflicting policies" and the policy question has been "committed to the agency's care by the statute ...." *Chevron*, 467 U.S. at 845 (*quoting United States v. Shimer*, 367 U.S. 374, 382-83 (1961)). Thus, "ambiguity" under *Chevron* is limited to situations where the agency is "resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Id.* at 865-66. Because of this, *Chevron* Step Two is triggered only when Congress placed the agency in the role of policymaker, such that the statute may reasonably be read as an implicit grant of authority by Congress to the agency to decide the question. Here, however, Congress itself made the policy decisions, by very carefully delineating when FERC could exercise its limited "backstop" authority.

Moreover, under *Chevron*, judicial deference to an agency's statutory interpretation is only appropriate when the policy choice the agency seeks to make depends upon its technical expertise. Thus, "ambiguity" warranting judicial deference turns upon

whether "a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Chevron*, 467 U.S. at 845. In the instant case, the interpretation of the phrase "withheld approval for more than 1 year" is well within the competency of courts, and does not require FERC's special expertise. Indeed, FERC did no more than repeat the statutory language in its regulations. Pet. App. at 194a.

Finally, to find a statute "ambiguous" in the relevant sense, a court must first find that "Congress did not actually have an intent ...." *Chevron*, 467 U.S. at 845. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 & n.9. The lack of consensus among the Fourth Circuit judges does not support the needed finding that Congress did not actually have an intent. None of the judges believed Congress lacked intent as to the meaning of the phrase "withheld approval for more than 1 year" in §216(b)(1)(C). Conversely, all of the judges concluded that Congress' intent was clear and unambiguous. Given that none of the judges below found the statute to be "ambiguous" within the meaning of *Chevron*, their disagreement does not create ambiguity for *Chevron* review purposes.

Petitioners' theory, that a lack of judicial consensus renders a statute ambiguous such that a court must defer to the agency's statutory interpretation, demonstrates a fundamental misunderstanding of *Chevron*. Under *Chevron*, deference is not required

merely because judges disagree about the meaning of a statute. Deference is only appropriate when the statute can be read as an implicit delegation of authority to the agency to resolve the matter. *See Chevron*, 467 U.S. at 845 (referring to "conflicting policies that were committed to the agency's care by the statute ...."). Disagreement among judges is not equivalent to a Congressional grant of authority to the agency. Moreover, Petitioners' theory is paradoxical, inasmuch at it postulates a Congressional delegation of authority to the agency even when none of the judges on the panel found any such implicit grant by Congress.

Petitioners' novel theory is particularly unwarranted because it would effectively delegate power to an agency, even if none of the judges found that Congress intended the issue to be decided by the agency. Such a result would not only thwart Congressional intent, it would also fundamentally intrude upon the inner workings of the judiciary. By effectively chilling judicial deliberations, the rule advanced by Petitioners would improperly frustrate independent judicial review of the actions of administrative agencies, even in cases where the agency seeks to set the outer limits of its powers. Such a standard of judicial review, which Petitioners offer without supporting decisional authority, could have potentially far-reaching adverse consequences.

The cases cited by Petitioners do not support their "judicial ambiguity" theory. Pet. Br. at 20. In *In re Thinking Machs. Corp.*, 67 F.3d 1021, 1023 (1st Cir. 1995), the First Circuit interpreted a bankruptcy statute pertaining to rejection of nonresidential leases. The case did not involve an agency or a regulation, and

therefore did not involve judicial review of an agency's statutory interpretation within the *Chevron* framework. Moreover, the "collision of viewpoints" language quoted by petitioners, Pet. Br. at 20, refers to differences of opinion among numerous other courts, and not to a dissenting judge on a particular panel. *In re Thinking Machs. Corp.*, 67 F.3d at 1025.

The decision in *United Mine Workers v. Federal Mine Safety and Health Review Comm'n*, 917 F.2d 42 (D.C. Cir. 1990), is also inapposite. Petitioners' selective reliance on *dicta* suggesting a divided agency panel may indicate "ambiguity" is misleading because the court itself found the language of the statute to be "ambiguous." Pet. Br. at 20. The court's conclusion was based on its own analysis, and not upon disagreement of the agency commissioners. *United Mine Workers*, 917 F.2d at 47.

II. PETITIONERS FAIL TO DEMONSTRATE THAT CONGRESS DEEMED THE SPECIFIC STATUTORY LANGUAGE AT ISSUE TO BE CRITICAL TO NATIONAL ENERGY POLICY.

A. The history of EPAct 2005 does not expressly address the particular issue that the Fourth Circuit decided.

Petitioners generally argue that more investment in transmission infrastructure is needed for electric system reliability. Pet. Br. at 11-12. Nowhere, however, do Petitioners expressly assert that State siting denials are hindering transmission line construction, or threatening in any way the reliability

of the electric grid.[7] Indeed, they cannot. At best, Petitioners point to isolated statements in the legislative history indicating that EPAct 2005 was created to address "[s]iting challenges" and to "streamline the permitting of siting for transmission lines." Pet. Br. at 13. These statements do not establish, however, that Congress intended to authorize FERC to override timely State permit denials. Thus, Petitioners have not shown that the legislative history of EPAct 2005 sheds light upon the discrete, narrow question of whether Congress intended to authorize FERC to act when a State has denied a siting permit within one year. Notably, FERC itself acknowledged that the legislative history is unclear on this question. Rehearing Order, 119 F.E.R.C. ¶61,154 at ¶15; Pet. App. at 254a.

B. Transmission infrastructure development is affected by issues far more substantial than the siting approval process.

Petitioners imply that State siting denials – or any potential for such – are the primary reason for the electric power industry's failure to construct needed transmission infrastructure. Pet. Br. at 11-13. To the extent there are shortages in transmission capacity, the primary reasons for such shortages are not state permit denials but, rather, economics and market structure, as Congress recognized in enacting EPAct 2005.

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[7] Such denials should be contrasted to state process delays or a lack of state authority to consider interstate benefits of a line, which Congress intended to address.

In the past, vertically integrated utilities built transmission mainly to move electricity within their own geographic service areas. *New York v. FERC*, 535 U.S. at 5 (2002); U.S. Department of Energy, *National Transmission Grid Study*, at 3 (May 2002), *available at* http://www.ferc.gov/industries/electric/indus-act/transmission-grid.pdf. In 1996, FERC adopted rules (pursuant to the Energy Policy Act of 1992, 106 Stat. 2776) to foster a transition to a competitive wholesale electricity market. *Id.* at 10; *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 61 Fed. Reg. 21,540 (May 10, 1996) (Order No. 888). This competitive market structure gave rise to two new demands on the transmission grid. First, wholesale electricity sellers needed to transmit power to their purchasers – which often required transmitting power across utility service territory boundaries. *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470, 479 (7th Cir. 2009) (Cudahy, J., concurring in part and dissenting in part). Second, newly constructed non-utility generators selling into the wholesale market required new lines to connect their output to the grid. *Id.*; *18 C.F.R. pt. 35 – Promoting Transmission Investment through Pricing Reform*, 116 F.E.R.C. ¶61,057, 61,250 at ¶25 (July 20, 2006).

In 2002, the DOE found that a major barrier to construction of new transmission facilities was developers' uncertainty as to whether they could realize sufficient earnings on their financial investments in transmission projects. *National Transmission Grid Study* at 30. Consequently, Congress created in EPAct 2005 new FPA §219, which required FERC to establish incentive-based transmission rates to, *inter alia*, "provide a return on

equity that attracts new investment in transmission facilities." EPAct 2005 §1241(a), (b)(2), codified at 16 U.S.C. §824*s*(a), (b)(2). FERC has found it necessary to approve rates of return in excess of 12.5% to attract such investment. *18 C.F.R. pt. 35 – Promoting Transmission Investment through Pricing Reform*, 113 F.E.R.C. ¶61,182, 61,276 at ¶21 (proposed Nov. 18, 2005). As FERC acknowledged in its §219 rulemaking, the debate over "whether transmission incentives are necessary to encourage new infrastructure was put to rest by the plain language of section 219(a)." Order No. 679 at ¶19.[8] Thus, continuing uncertainty as to return on investment, rather than prompt State permit denials, is likely the primary obstacle to transmission infrastructure development.[9] Because this case is not about transmission financing, it does not present an opportunity for the Court to advance the construction of new transmission facilities.[10]

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[8] The investment incentive problem remains particularly acute for so-called "merchant transmission lines," for which the developer receives payment via private agreements, rather than by rates established through regulatory and/or planning processes. *Chinook Power Transmission*, 126 F.E.R.C. ¶61,134, 61,767 at ¶45 (2009).

[9] In fact, one of the pending siting applications Petitioners point to in their petition (at 9) was withdrawn by the applicant one week after FERC refused to alter the regional grid operator's economic planning process so as to allow the project to receive incentive-based rates under the grid operator's tariff. *N.Y. Indep. Sys. Operator, Inc.*, 126 F.E.R.C. ¶61,320, 18-43 (2009) (order on reh'g).

[10] Another major factor affecting investment in transmission facilities is the allocation of costs among electric utilities. That topic was recently addressed by the United States Court of Appeals for the Seventh Circuit. *Illinois Commerce Comm'n*, 576

C. Siting-related legislation remains a work in progress.

The overall field of electric transmission policy remains in flux. Congress continues to refine its approach to electric transmission facilities siting. In light of new federal policy fostering renewable energy facilities construction, the House of Representatives passed the American Clean Energy and Security Act of 2009, that would further tailor FERC's siting jurisdiction. H.R. 2454, 111th Cong. (2009).[11] This bill would expedite deployment of new transmission capacity to connect such renewable energy facilities to the power grid. *Id.* at §151. As a practical matter, therefore, there is no urgency warranting the Court's attention because Congress is actively dealing with transmission siting issues.

III. NO HARM WILL RESULT FROM ALLOWING THE FOURTH CIRCUIT'S DECISION TO STAND.

Petitioners overstate the potential consequences of this Court's denial of certiorari. They speculate that some siting applications will not be filed if State siting denials cannot be reviewed by "a body taking a broader regional or national perspective." Pet. Br. at 21-22. This argument fails to credit Congress' express decision to preserve the primary siting jurisdiction of States having legal authority to consider the expected

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F.3d 470. The case was remanded to FERC for further proceedings.

[11] A Senate version was introduced by Senators Kerry and Boxer on September 30, 2009.

interstate benefits of proposed transmission. 16 U.S.C. §824*p*(b)(1)(A)(ii)). Congress did this because it recognized that the States directly and materially benefit from the interconnected electric grid and, therefore, have a compelling local interest in considering the interstate benefits of proposed transmission facilities. Petitioners' contrary implication that States are entirely parochial when reviewing proposed transmission facilities is baseless. Furthermore, inherent in Petitioners' speculation is the notion that a State court reviewing a State agency's siting denial would fail to give effect to Congress' implicit directive to consider interstate benefits. Petitioners offer no basis for their presumptions that State courts would act inappropriately in reviewing State agency decisions.

The worst-case scenario for transmission developers is that the Fourth Circuit's decision will encourage them to work closely and cooperatively with State siting authorities. This can hardly be perceived as a deleterious consequence.

CONCLUSION

For the foregoing reasons, Petitioners do not state any compelling reasons for granting the petition for a writ of certiorari. Therefore, the petition should be denied.

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